INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	5
Conclusion	14

CITATIONS

Cases:

Barnes v. *United States*, 412 U.S. 837	8
Beatty v. *United States*, 377 F.2d 181	11, 12
Bruton v. *United States*, 391 U.S. 123	6
Bryson v. *United States*, 396 U.S. 64	8
Dennis v. *United States*, 384 U.S. 855	8
Horne v. *United States*, 264 F.2d 40	11, 12
Mesarosh v. *United States*, 352 U.S. 1	13
Opper v. *United States*, 348 U.S. 84	6
Rogers v. *United States*, 319 F.2d 5	12
United States v. *Augello*, 451 F.2d 1167	9
United States v. *Carson*, 464 F.2d 424, certiorari denied, 409 U.S. 949	7
United States v. *Clay*, 476 F.2d 1211	14
United States v. *DeMet*, 486 F.2d 816, certiorari denied, No. 73-989, April 29, 1974	8, 9
United States v. *Enmons*, 410 U.S. 396	9
United States v. *Gill*, 490 F.2d 233, certiorari denied, No. 73-1492, June 17, 1974	8-9
United States v. *Guerrero-Peralta*, 446 F. 2d 876	12

Cases—Continued Page

United States v. *Johnson*, 327 U.S. 106 13-14
United States v. *Kahan*, 415 U.S. 239 7
United States v. *Lane*, 479 F.2d 1134 12
United States v. *Ricks*, 475 F.2d 1326 12, 13
United States v. *Romano*, 382 U.S. 136 8
United States v. *Soles*, 482 F.2d 105, certiorari denied, 414 U.S. 1027 14
United States v. *Sweig*, 441 F.2d 114 7
United States v. *Vega*, 447 F.2d 698, certiorari denied, 404 U.S. 1038 12, 13
Williams v. *United States*, 332 F.2d 36 12

Constitution, statutes, and rules:

United States Constitution, Fifth Amendment 8
18 U.S.C. 1623 3
18 U.S.C. 1951 2, 8, 9
Rule 23(b), Fed.R.Crim.P. 4, 11, 12, 13
Rule 30, Fed.R.Crim.P. 9

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-243

JAMES V. PACENTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. A) is not yet reported. The original panel opinion of the court of appeals (Pet. App. B) is reported at 490 F.2d 661.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on August 6, 1974. The petition for a writ of certiorari was filed on September 6, 1974 and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the trial court properly denied petitioner's motion for severance of an extortion charge and a perjury count arising from the same transaction.
2. Whether the interstate commerce element specified by 18 U.S.C. 1951 was properly established.
3. Whether a stipulation between the government and petitioner, agreeing to accept the verdict of a panel of fewer than twelve jurors should one or two be excused for cause, was properly enforced by the district court.
4. Whether the district court properly denied petitioner's motion for a new trial based on allegedly newly discovered evidence.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner, a member of the Chicago police force, was convicted of extorting money from a liquor store proprietor, in violation of 18 U.S.C. 1951 (extortionate interfer-

ence with commerce) and of perjury before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to concurrent terms of three years' imprisonment. A panel of the court of appeals reversed, holding that the district court should have granted petitioner's motion for severance of the extortion and perjury charges (Pet. App. B). Thereafter, the court of appeals accepted the government's suggestion for a rehearing *en banc*, overturned the decision of the panel, and affirmed petitioner's conviction (Pet. App. A).

The evidence showed that in February 1971, shortly before he opened a Chicago liquor store, Stojan Kovacevic was called on the telephone by a man identifying himself as a police officer, who asked him to come to the police station. When Kovacevic objected, indicating that he had already secured all the necessary licenses for his business, the caller said that he would talk to him later (Tr. 17-18).[1] One month later, Kovacevic testified, petitioner entered the liquor store and identified himself as the individual who had called previously (Tr. 21). Petitioner then stated:

> "You look like nice fellow" say, "I supposed to take you to the police station, but," he say, "that's all right," he will be back again. "I see you again." [Tr. 21.]

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[1] "Tr." refers to the trial record, while "R." refers to the Clerk's record.

Subsequently, in June 1971, petitioner appeared in Kovacevic's store, accompanied by an individual to whom the latter had just sold some liquor. Petitioner said that the customer was under age and that Kovacevic would have to come with him to the police station. Kovacevic complained, because no one was available to tend the store (Tr. 22-25), whereupon petitioner asked "How much money can you give me?" (Tr. 25). Kovacevic offered first fifty and then one hundred dollars, which petitioner rejected:

> He say, "No, I can't take $100.00 because I have some other people in the car across the street and I have to take care of them, too." [Tr. 25.]

Finally, petitioner agreed to accept a check for two hundred dollars (Tr. 26), which was made out to cash (Tr. 27). This check was cashed without endorsement at a tavern located near petitioner's residence (Tr. 142, 123-127).

Petitioner was later called before a grand jury, where he denied that he had received this particular check (Tr. 158-159). His grand jury testimony formed the basis of the perjury charge against him.

On the first day of the trial, it was stipulated in writing pursuant to Rule 23(b), Fed.R.Crim.P., that if one or two jurors were excused for good cause, the trial could nonetheless proceed to a final verdict.[2]

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[2] The stipulation read as follows (R. 25):

> IT IS HEREBY STIPULATED by and between the parties hereto by their respective attorneys that in case

At 11:00 p.m. on the day the jury began its deliberations, a marshal informed the trial judge that the husband of one of the jurors had notified him that the juror's father had become seriously ill and was not expected to live. The trial judge immediately excused the juror (Tr. 333-334).

ARGUMENT

1. Petitioner argues that the district court erred in denying his motion for severance of the perjury and extortion counts, since, he claims, the jury's decision on the extortion charge was influenced by its realization, induced by the presence of the perjury count, that the grand jury had heard petitioner testify on the matter and did not believe him. But, in the circumstances of the instant case, the trial court did not abuse its discretion in refusing to sever the two counts. The trial court adequately guarded against the jury reaction petitioner hypothesizes by giving careful instructions:

> The indictment that I am going to refer to in a few moments is not evidence of the defendant's guilt, it is simply * * * the manner by which the government accuses a person of a crime, and you should not be prejudice[d] against a defendant because an indictment has been returned against him. [Tr. 312.]

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one but not more than two jurors shall be excused from the panel by reason of illness or for any other good cause as determined by the Court, that the trial may proceed before the remaining members of the panel with the same force and effect as if a full panel were present.

> You are instructed to consider the testimony given by the defendant Pacente before the Grand Jury on February 22nd only as evidence under Count 2 [the perjury charge] of the indictment and you should not consider it as evidence on any other count in the indictment. [Tr. 324-325.]
>
> Now, there are two counts in this indictment, and, as I have told you, each one charges a separate crime. You should consider each one separately. The defendant's guilt or innocence of the crime charged in one count should not affect your verdict on the other count * * *. [Tr. 326.]

As this Court has noted, "[o]ur theory of trial relies upon the ability of a jury to follow instructions." *Opper* v. *United States*, 348 U.S. 84, 95.[3]

In any event, the possibility of prejudice from the joinder of the two counts was remote. Petitioner suggests that the trial jury's awareness that he had testified before the grand jury and that the grand jury had not believed his remarks impermissibly influenced its decision on the substantive extortion charge.[4] As reasoned below, "[i]n order to find merit

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[3] In contrast to *Bruton* v. *United States*, 391 U.S. 123, upon which petitioner relies (Pet. 24), this is not a case in which cautionary instructions are inadequate. In *Bruton*, a co-defendant's confession directly implicated the defendant, and constituted strong and convincing evidence of his guilt which the jury was unlikely to be able to ignore. In the instant case, the grand jury's action was only a step by which the petitioner was brought to trial. It was merely an accusation by individuals with no unique knowledge of the crime, which was unlikely to prejudice the jury.

[4] It is at least possible that evidence concerning the perjury count could properly be brought to the jury's attention at a

in defendant's position, we would have to assume that the trial jurors will treat Count II not merely as a formal accusation of a false declaration, but as a pronouncement, worthy of respect, of an opinion concerning Count I" (Pet. App. 7). See, *e.g.*, *United States* v. *Carson*, 464 F.2d 424, 436 (C.A. 2), certiorari denied, 409 U.S. 949; *United States* v. *Sweig*, 441 F.2d 114 (C.A. 2).

The possibility that a petit jury may improperly be influenced by the conclusion of the grand jury to indict a defendant is, of course, inherent in every case proceeded upon by indictment. The question here is whether this acceptable, unavoidable consequence of our grand jury system is somehow so exacerbated by the joinder of a perjury charge as to create a real and serious danger of impropriety sufficiently grave that the normal interest in efficient disposition of criminal charges by joinder of charges arising out of the same transaction and provable by essentially the same evidence is overbalanced thereby. We believe that the court of appeals was clearly correct when it concluded (Pet. App. 7-8):

> * * * it is the judgment of a majority of this court that it is an unwarranted over-refinement to speculate that * * * [there is] a significant danger that the trial jurors, acting together, will give weight to the conclusion reached by the grand jurors and fail to decide the issues of fact according to their own proper evaluation of the evidence.

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severed trial on the extortion count. See Pet. App. 6; cf. *United States* v. *Kahan*, 415 U.S. 239, 241.

In any event, since the evidence concerning the extortion was clearly relevant to the perjury count, and since petitioner received identical concurrent sentences on both counts, this Court need not consider whether petitioner was prejudiced on the extortion count by evidence relating to his perjury. See *United States* v. *Romano*, 382 U.S. 136, 138; *Barnes* v. *United States*, 412 U.S. 837, 848.[5]

2. At trial, it was stipulated that the liquor supplies in Kovacevic's store were obtained from local distributors, who in turn received their stocks from outside the State. Petitioner argues that the liquor goods had come to rest within Illinois before reaching Kovacevic and thus no interstate commerce, as required by Section 1951, was involved. There is no merit to this contention. This Court has recently refused to review two cases raising precisely this issue, on petitions of other Chicago policemen likewise convicted under Section 1951 of extorting funds from local liquor retailers. See *United States* v. *DeMet*, 486 F.2d 816 (C.A. 7), certiorari denied, No. 73-989,

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[5] Petitioner attempts to justify his perjury by pointing out that under Rule 51 of the regulations of the Chicago Police Department then in effect, but subsequently held unconstitutional, he would have been suspended from the police force had he invoked the Fifth Amendment before the grand jury (Pet. 26, n. 12). But see *Bryson* v. *United States*, 396 U.S. 64, 72: "* * * [I]t cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." See also *Dennis* v. *United States*, 384 U.S. 855, 867.

April 29, 1974; *United States* v. *Gill*, 490 F.2d 233 (C.A. 7), certiorari denied, No. 73-1492, June 17, 1974. Petitioner's error lies in a failure to realize that, as the court below noted in *Gill*, *supra*, 490 F. 2d at 236, "[Section 1951] not only forbids extortion which interferes with interstate commerce but also extortion which affects interstate commerce." [6] And, contrary to petitioner's corollary argument, no *de minimus* test has been imposed upon the terms of Section 1951, which provides sanctions against anyone who "in any way" affects commerce. See *United States* v. *Augello*, 451 F.2d 1167, 1169 (C.A. 2), *United States* v. *DeMet*, *supra*, 486 F.2d at 822 and cases cited.[7]

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[6] Petitioner's reliance on *United States* v. *Enmons*, 410 U.S. 396, is misplaced. In *Enmons*, the Court held that Section 1951 could not be used to prosecute labor leaders who, during a legal strike, participated in acts of violence in order to persuade the struck company to agree to the strikers' demands. This decision was not based upon any lack of interference with interstate commerce, but rather upon the Court's conclusion that Section 1951 "limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *Id.* at 400. Since the strikers enjoyed a legal right to strike and demand higher wages, the property sought through the acts of violence was not something to which they had no legitimate claim.

[7] Petitioner asserts that the trial court erred in failing to read the entire definition of commerce as that term is explained in 18 U.S.C. 1951(3) (Pet. 16). As the court below noted, petitioner failed to object after the instruction was given, as required by Rule 30, Fed. R. Crim. P., and, in any event, it was apparent that notwithstanding the trial judge's inadvertent omission of part of the definition, he was refer-

3. Nor is there merit to petitioner's claims of error concerning the jury stipulation. He first argues that he is not bound by the stipulation because the agreement was signed by his attorney rather than himself personally, and that nothing in the record indicates his acquiescence. But the stipulation itself characterized the agreement as being "by and between the parties hereto by their respective

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ring to commerce between Illinois and other States (Pet. App. 13-14). The stipulation clearly established that such commerce was involved in the instant case.

Petitioner also contends that the trial court erroneously instructed the jury that they might find him guilty of the entire indictment generally if they found him guilty on either one of the two counts (Pet. 27-28). The challenged instruction stated:

> Now, there are two counts in this indictment, and, as I have told you, each one charges a separate crime. You should consider each one separately. The defendant's guilt or innocence of the crime charged in one count should not affect your verdict on the other count and if you find the defendant is guilty beyond a reasonable doubt of either of the crimes charged in the indictment, then a verdict of guilty should be returned." [Tr. 326.]

As the court below noted, it is inconceivable that this instruction could be interpreted by the jury as permitting a general guilty verdict upon a finding of guilt upon either count. Such an interpretation "would be inconsistent with the preceding portion of the same sentence. Moreover, the court furnished three forms of verdict, one for a verdict of guilty on both counts, one for not guilty on both, and one for guilty on one (with the number to be inserted) and not guilty on the other. These forms were read and their use explained. The jury could not reasonably have understood the instruction as suggested by defendant" (Pet. App. 16).

attorneys" (R. 25). And as the court below observed, nothing in the record indicates that petitioner did not willingly accept this agreement (Pet. App. 18):

> It does show a colloquy in open court the morning after the juror had been excused pursuant to the stipulation and while the jury continued to deliberate. The judge announced the facts concerning the excused juror. Defense counsel objected "notwithstanding the stipulation" on the ground he had not been notified. Defendant said nothing. The judge later indicated a plan to let the jury deliberate until about 11 a.m., give a modified Allen instruction, let the jury deliberate until noon, and then discharge it if no verdict had been reached. Defense counsel then said: "My defendant's and my suggestion, your Honor, just to leave them wait [sic]. We would object to any Allen Charge and I will object to them being discharged, your Honor." Defendant remained silent. We conclude that defendant is not in a position to repudiate his attorney's authority to agree to reduction in the size of the jury.

Nor is there a conflict among the circuits on the issue of what constitutes a valid waiver of a twelve person jury. The cases cited by petitioner all involved situations where an oral stipulation was alleged (as opposed to the written one described in Rule 23(b)), and all constituted simply factual determinations of whether or not a knowing waiver was made. See, *e.g.*, *Beatty* v. *United States*, 377 F.2d 181, 185 (C.A. 5); *Horne* v. *United States*, 264 F.2d 40 (C.A.

5); *Williams* v. *United States*, 332 F.2d 36 (C.A. 7); *United States* v. *Lane*, 479 F.2d 1134 (C.A. 6); *United States* v. *Guerrero-Peralta*, 446 F.2d 876 (C.A. 9); *United States* v. *Vega*, 447 F.2d 698 (C.A. 2), certiorari denied, 404 U.S. 1038; *United States* v. *Ricks*, 475 F.2d 1326 (C.A. D.C.); *Rogers* v. *United States*, 319 F.2d 5 (C.A. 7). And, contrary to petitioner's suggestion (Pet. 33), several of these cases held that there was a valid waiver, even though the defendant was not personally addressed by the trial court. See *Horne*, *supra*; *Williams*, *supra*; *Beatty*, *supra*; *Vega*, *supra*. In *Guerrero-Peralta*, *supra*, emphasized by petitioner, the court merely decided that, absent a written stipulation, there was insufficient indication from the record of that case that the defendant had consented to the stipulation. In contrast, in the instant case, petitioner's consent to the written stipulation is apparent from the record.

In the alternative, petitioner contends that the stipulation envisioned the incapacity of a juror only before the case was submitted to the jury and did not cover incapacity occurring thereafter. However, if that had been petitioner's intent he would presumably have objected on that ground when the trial judge announced that he had excused one of the jurors (Tr. 333-335), or at least urged that the stipulation had been misinterpreted when he subsequently moved for a new trial (R. 42). He did not do so. Contrary to petitioner's interpretation of Rule 23(b), that provision on its face covers this case; it states that a stipulation may be made "* * * at

any time before verdict * * *." See also *Vega*, *supra*, and *Ricks*, *supra*, wherein Rule 23(b) stipulations were acted upon after jury deliberation had begun.[8]

4. Finally, petitioner argues that the district court erred in not granting his motion for a new trial based upon allegedly newly discovered evidence. At trial, the complaining witness Kovacevic testified that the individual who extorted the $200 check had been clean shaven (Tr. 62), while petitioner, his wife, sister-in-law, and barber stated that petitioner had sported a mustache in June 1971 (Tr. 186, 192, 195, 220). After the jury verdict, petitioner moved for a new trial on the ground that he had found an attorney against whose client he had testified in June 1971, and that this attorney would also testify that petitioner had a mustache at that time (R. 44). This evidence tending to impeach Kovacevic's testimony was obviously cumulative to that which had already been rejected by the jury. As such, the district court's refusal to grant a new trial was proper, for the well established rule is that new evidence not likely to produce a different result, particularly cumulative or impeaching evidence, does not constitute sufficient grounds for a new trial. See *Mesarosh* v. *United States*, 352 U.S. 1, 9; *United States* v. *Johnson*, 327

[8] There is similarly no merit to the argument that petitioner's counsel should have been notified before the juror was excused. As the trial judge indicated, the lateness of the hour and the personal emergency of the affected juror rendered such a course of action impractical; at any rate, any objection to her being excused would have been rejected (Tr. 333-334).

U.S. 106, 110, n. 4; *United States* v. *Soles*, 482 F.2d 105, 107-108 (C.A. 2), certiorari denied, 414 U.S. 1027; *United States* v. *Clay*, 476 F.2d 1211 (C.A. 9).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1974.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 583776 69